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NO: 84-1540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JACK DUCKWORTH,
WARDEN, INDIANA STATE PRISON

Petitioner

V

RICHARD W. DILLON,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Whether Respondent was denied effective assistance of counsel pursuant to the Sixth Amendment where trial counsel informed the Court of his incompetence, failed to act in a competent manner at trial and the trial court failed to ascertain whether Respondent knowingly and intelligently appreciated his counsel's conduct?

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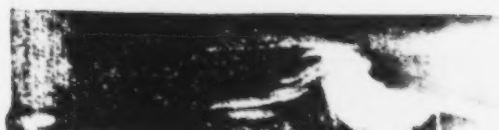

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## STATEMENT OF THE CASE

### NATURE OF THE CASE

This appeal involves the grant of Respondent, Richard Dillon's Petition for Writ of Habeas Corpus, which reversed a District Court judgment denying the Petition.

### COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BY LOWER COURTS

Respondent was convicted of Murder, Burglary and Conspiracy in the Superior Court of Knox County, Indiana. Respondent was sentenced to death August 21, 1981. On direct appeal, the Indiana Supreme Court affirmed the verdicts and sentence October 3, 1983, and denied rehearing.

The United States Supreme Court denied Respondent's Petition for Writ of Certiorari, No. 83-6136, on March 19, 1984.

On March 30, 1984, Respondent filed in District Court, in Forma Pauperis, his Petition for Writ of Habeas Corpus. This Petition alleged, inter alia, that Respondent's Sixth Amendment right to counsel was denied in the State court. The District Court denied Respondent's motion for an evidentiary hearing on the issue of effective counsel. The District Court denied the Habeas Corpus Petition on June 21, 1984. Appendix, pp. A-18 and A-31.

Notice of Appeal was properly filed July 18, 1984. Respondent appealed, in Forma Pauperis, three issues to the Seventh Circuit Court of Appeals: (1) Whether Respondent, Petitioner-Appellant below, received effective assistance of counsel; (2) Whether the District Court should have held an evidentiary hearing; (3) Whether the State trial court's findings imposing the death penalty were sufficient. Briefs were filed and oral argument held on October 31, 1984.

The Seventh Circuit reversed the District Court as to the issue of ineffective counsel. The Seventh Circuit ordered the Writ of Habeas Corpus to issue unless Respondent was retried within ninety (90) days. This order has been stayed pending the disposition of the State's Petition.

STATEMENT OF FACTS

Respondent's trial in Knox County, Indiana, Superior Court, began July 20, 1981. The death penalty was requested. On July 7, 1981, at a suppression hearing, Respondent's trial attorney told the court that he was not prepared for trial, was not competent to try the case and asked to withdraw as Respondent's counsel. After the Respondent's conviction, trial counsel filed an affidavit attesting to his incompetence. Appendix, pp. A-33 and A-53. Trial counsel cited outside pressure and lack of preparation as his major problems.

After trial counsel's actions on July 7, the trial court did not talk to Respondent to determine whether he understood what had transpired. An in-court colloquy followed, but this was only between Respondent and his trial attorney. The trial court did not intervene. R. 640-42, 842. Respondent's counsel was given one (1) extra weekend to prepare for trial. Appendix, p. A-35. At trial, counsel tendered no final instructions and objected only generally to the State's trial instructions. R.464-65.

During the trial, apparently believing himself to be an accessory to the crime, Respondent attempted to plead guilty. R. 1346. Respondent failed to lay a basis for his plea and it was rejected. R. 1357.

At the sentencing portion of the trial, Respondent's entire trial testimony was placed in evidence by his attorney. Respondent, by affidavit in support of his Petition for Writ of Habeas Corpus, alleged that his trial counsel had a potential conflict of interest with a co-defendant and committed other improprieties during the trial. Dist. Ct. R. doc. 9.

## SUMMARY OF THE ARGUMENT

Respondent's trial counsel stated he was not competent immediately prior to the capital murder trial beginning. Counsel's acts and omissions could not be characterized as strategic decisions. The facts here do not achieve the level of the attorney's actions in Strickland v. Washington. Sufficient evidence exists to support the Seventh Circuit Court of Appeal's finding of ineffective counsel.

## REASONS FOR DENYING THE WRIT

RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL'S STATEMENTS AND ACTIONS CAST SERIOUS DOUBT UPON COUNSEL'S COMPETENCE, WHILE THE TRIAL COURT FAILED TO DELVE INTO, OR DETERMINE, RESPONDENT'S UNDERSTANDING OF HIS ATTORNEY'S ACTIONS.

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The decision of the Seventh Circuit is not in conflict with the applicable rulings of this Court: Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, ___U.S. ___, 104 S. Ct. 2039, 80 L.Ed. 2d 657 (1984). The Seventh Circuit's decision is a detailed analysis of a complex set of facts, not one which completely ignores precedent. Thus, Rule 17(c), Rules of the Supreme Court of the United States, does not make this a case where certiorari should issue.

Strickland and Cronic apparently set an objective, federal standard in Sixth Amendment counsel cases. Strickland v. Washington, supra, at 80 L. Ed. 2d 693. On the surface, some of the facts in these two cases comport with the instant case. However, there are major differences distinquishing the Respondent's case from Strickland and Cronic.

In Strickland it is clear that the defense attorney made specific, strategic decisions. Clear evidence existed on the record to support counsel's action. A presentence report would likely have hurt the defendant. Strickland v. Washington, supra at 80 L.Ed. 2d 684. Counsel was receiving little cooperation from his client. Id. at 683-84. The defendant lied about his past record to the trial judge prior to sentencing. Id. Counsel had a clear, albeit limited, avenue of defense open to him: "rely on the plea colloquy for evidence about respondent's background and about his claim of emotional distress....": in essence submit to the mercy of the court based upon the trial judge's prior statements. Id. at 80 L.Ed. 2d 684. There is no defense or strategic purpose implied by counsel's actions in Respondent's case.

Strickland considered several factors in evaluating counsel's performance. This Court pointed out that defendant was appointed "an experienced criminal lawyer to represent him." Id. at 80 L.Ed.2d 683. The analysis included counsel's actions as compared to the actions of his client. Id. at 80 L.Ed.2d 683-84. Counsel's preparation and discovery activities were examined. Id. at 80 L.Ed.2d 683-84, 688-89. Further, this Court examined counsel's alleged errors in representation. Id. at 80 L.Ed.2d 685-86, 688-89, 700-01. Counsel in Strickland was involved only in a criminal plea and sentencing hearing. There was no trial conduct to examine. Id. at 80 L.Ed.2d 683-84.

Clearly, the Court in Strickland specifically considered the factors looked to by the Seventh Circuit in the instant case, as they were available to them

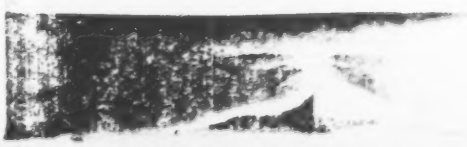
from the particular facts of the case: experience, conduct of counsel and preparation. Other factors considered by the Seventh Circuit have traditionally been included in cases involving ineffective counsel.

Kemp v. Leggatt, 635 F. 2d 453 (5th Cir. 1981) involved an affidavit asserting incompetence, filed by the trial attorney and failure to present jury instructions. Hackman v. Parratt, 661 F. 2d 1161 (8th Cir. 1981) involved counsel's failure to attempt any plea negotiations. A proper analysis, therefore, can include experience, trial and pre-trial motions evidencing lack of preparation, problems effecting preparation, counsel's trial conduct, plea negotiation efforts and actual preparations.

There is nothing preceivably evident from trial counsel's conduct from which his strategy or evaluation of the case can be discerned. Thirteen days before the trial, counsel declared his incompetence and lack of preparation to the court. R.638. Counsel at that time tried to withdraw from the case. R. 638, 640. Respondent was advised he was an accessory and attempted to enter a guilty plea. R.1346-57. Respondent was unable to lay a proper basis for the plea. R.1357. Counsel waived any error in the State's jury instructions by only generally objecting to them. R.465. Counsel failed to submit any final instructions on Respondent's behalf. R.464. See Rufer v. State, 264 Ind. 258, 342 N.E. 2d 856 (1976); In Re Sobieski, 246 Ind. 222, 204 N.E. 2d 353 (1965); Robinson v. State, 309 N.E. 2d 833 (Ind. App. 1974).

Trial counsel incorporated all of Respondent's damaging testimony from the guilt portion of the trial into the sentencing portion. R.2077. Further, he failed to object to the State's introduction of this testimony. R.2075-76. During trial, counsel consulted with the attorney for a co-defendant, an alleged accomplice Respondent ultimately testified against. R. 834-35. Additionally, Counsel later stated that he did not prepare adequately, or consult





with his client sufficiently, in connection with the case. Appendix, pp. A-53-4. Counsel's behavior was so bizarre, so clearly outside the conduct expected by an attorney in a capital case, that the Strickland factual situation is inapposite.

Strickland, as was clearly stated by this Court, was decided on that particular combination of facts. Strickland v. Washington, supra, 80 L.Ed.2d at 701.

Respondent contends that the instant case involves "circumstances that are so likely to prejudice the accused that the cost of litigating their effect... is justified." United States v. Cronic, supra, 80 L.Ed. 2d at 667. Because of counsel's behavior, it is impossible to say whether he subjected the State's case to a meaningful adversarial test. Id. 80 L.Ed. 2d at 668.

Admittedly, every refusal to continue a criminal trial does not presume insufficient preparation. Id. at 80 L.Ed. 2d 669. Here, though, additional factors are present: counsel's statement of incompetence; trial of a death penalty case; assertion of inadequate preparation; indications that counsel, by his actions and omissions, took a hurried, perfunctory course in defending Respondent. A continuance of one weekend does not remedy these problems. Appendix, p. A-35. Any one factor is not necessarily determinative. Id. at 80 L.Ed 2d 671. However, the weight created by the entire record supports the Seventh Circuit's decision.

In Cronic, the defendant's apparent satisfaction with his trial counsel was determined at trial. Id. at 80 L. Ed. 2d 663, n. 6. As was argued below, the trial court in the instant case did not question Respondent about his attorney's statement or actions. R. 842; Appendix, p. A-6, n.3. Although Respondent's opinion may not be material, Id. at 80 L. Ed. 2d 667, n.21, under the exceptional set of facts herein, it was incumbent upon the trial court to ascertain Respondent's understanding of what was happening.

See North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); United States v. Alvarez, 580 F. 2d 1251 (5th Cir. 1978).

Trial counsel's actions were not what should be expected from a reasonably competent attorney. No case relied upon by either party ever began with the trial attorney declaring himself to be incompetent. The Respondent was facing a possible death penalty. Respondent's trial counsel has subsequently been disbarred. Appendix, p. A-9, n.6. The result of the trial cannot be labeled reliable and just.

The narrow factual situation of Strickland is not present here. Counsel's conduct cannot be linked to the clearly strategic Strickland conduct. No indication of "reasonable professional judgment" exists. Strickland v. Washington, supra, at 80 L. Ed. 2d 7901. Counsel's conduct is so unusual that it patently "undermined the proper functioning of the adversarial process." Id. at 80 L. Ed. 2d 692-93. Equity and an interest in the perception of fairness and justice in this type of capital case dictates that Respondent should be granted a new trial.

## CONCLUSION

For the reasons set forth above, it is respectfully requested that a writ of certiorari be denied.

Respectfully submitted,

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